No. 11449

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLOTILL PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*),[1] for enforcement of its order issued against Flotill Products, Inc. (herein called respondent) on August 19, 1946 (70 N. L. R. B. 118; R. 74–107).[2] Jurisdiction of this Court is based upon Section 10 (e) of the Act. The unfair

[1] Relevant portions of the Act appear in the Appendix, *infra*, pp. 38–43.

[2] On November 6, 1946, this Court granted the petition for leave to intervene in this proceeding filed on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L. and California State Council of Cannery Unions, A. F. L. (R. 528–529).

labor practices occurred at respondent's plant in Stockton, California,[3] within this judicial circuit.

STATEMENT OF THE CASE

A. The facts as found by the Board

This case presents the question of the validity of the Board's finding that respondent under the circumstances presented committed an unfair labor practice by entering into an exclusive-recognition and closed-shop contract with the A. F. L.[4] on March 5, 1946. Briefly, the relevant and undisputed facts are as follows:

1. Prior contractual relations

In 1940, the A. F. L. entered into a bargaining agreement (herein called the master agreement) with California Processors and Growers, Inc. (herein called C. P. & G.), the dominant trade association in the canning and processing industry for this California area (R. 25–26, 127–130, 268, 311–313). Respondent, although not a member of the C. P. & G., has for several years followed the practice of subscribing to the master agreement (R. 127, 304–306, 312–313); in addition, it has embodied in separate supplemental contracts with the A. F. L. matters not

[3] Respondent, a California corporation, operates a plant at Stockton, California, where it is engaged in the canning and processing of fruits and vegetables, most of which are sold in interstate and foreign commerce (R. 124–126). Respondent concedes that it is subject to the Act (R. 125–126); hence no issue is presented as to jurisdiction.

[4] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., and California State Council of Cannery Unions, A. F. L., and their predecessor A. F. L. organizations, hereinafter called the A. F. L. (R. 274–282, 290–291, 294–295, 302–304).

covered by the master agreement (*ibid.*). The last master agreement and respondent's separate contract were to expire on March 1, 1946 (R. 58).

2. The representation proceeding

In July 1945, the C. I. O.[5] filed a petition with the Board alleging that a question affecting commerce had arisen concerning the representation of respondent's employees within the meaning of Section 9 (c) of the Act (R. 297–299, 509–510). Petitions alleging the same question were filed by the C. I. O. for the employees of members of the C. P. & G. and other employees in the area (R. 22–26). During July, August, and September 1945, pursuant to appropriate orders of the Board, consolidated hearings, in which the various employers, including respondent, were represented, were held on these petitions in what has come to be known as the *Bercut-Richards* case (R. 22–23, 126; *Matter of Bercut-Richards Packing Co., et al.,* 64 N. L. R. B. 133). At the hearing on the petitions, the A. F. L. contended that its existing agreements constituted a bar to the representation proceedings and urged that the Board dismiss the petitions on the ground that no question concerning representation existed. 64 N. L. R. B. 133, 135.

On October 5, 1945, the Board issued a telegraphic order directing an election in the consolidated cases. It found that the existing contracts did not constitute a bar to the representation proceedings because the contracts were to expire within a short time, and

[5] Food, Tobacco, Agricultural and Allied Workers Union of America, C. I. O.

the residual period of the contracts was one in which canning operations would be at a low ebb and a relatively small number of employees would be working. 64 N. L. R. B. 133, 135 (R. 22–26, 126).[6] On October 15, 1945, pursuant to the Board's order, the Regional Director conducted an election among respondent's employees in the unit found to be appropriate (R. 48–49, 126, 325). Of the 205 valid and unchallenged votes counted, 105 were cast for the A. F. L. and 100 for the C. I. O.; in addition, there were 20 challenged ballots (R. 67).

The A. F. L. filed objections to all the elections held pursuant to the *Bercut-Richards* decision, including the election held among respondent's employees (R. 48–49, 472–503). On January 16, 1946, the Regional Director issued his Report on Objections to the election (R. 354–471). On February 15, 1946, after a hearing on the objections, the Board issued a "Supplemental Decision and Order" in the consolidated cases vacating and setting aside all the elections on the ground that their results were inconclusive (R. 48–67). Since, by reason of the seasonal nature of the canning industry, it would be several months before the spring season reached its peak (R. 266–267), the Board stated that new elections would be held as early in the 1946 season as there was substantial employment, or even sooner,

[6] The Board subsequently, on October 12, 1945, issued a formal Decision, Direction of Elections, and Order consonant with the determinations and findings made in the telegraphic decision. 64 N. L. R. B. 133.

if adequate voting lists could be prepared (R. 59, 126). The Board then declared (R. 58–59):

> While we view the record as requiring this result, we reach it with considerable reluctance because it means that the employees will have no bargaining representative to negotiate an exclusive collective agreement to cover the coming season, until a new election can be held which may result in one of the rival unions being certified. The current AFL contract will expire on March 1 and since *the legal effect of the foregoing determination is to keep the question of representation pending before the Board,* none of the unions is entitled to an exclusive status as the bargaining agent after that date. In accordance with well-established principles,[14] *the employers may not, pending a new election, give preferential treatment to any of the labor organizations involved,* although they may recognize each one as a representative of its members. In this state of the record *no legal effect may be given the closed-shop provision contained in the current collective agreements after their expiration date;*[15] the inclusion of any such provision in any new agreements, or action pursuant thereto, would clearly be contrary to the proviso in sub-section 8 (3). Nothing in our decision, however, should be construed as requiring any change in the substantive con-

[14] See *Matter of Midwest Piping & Supply Co., Inc.*, 63 N. L. R. B. 163; See also *Matter of Ken-Rad Tube & Lamp Corp.*, 62 N. L. R. B. 21.

[15] Moreover, no requests for discharges resulting from activity in the election are justified even under the present agreement. See *Matter of Rutland Court Owners*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040."

> ditions now existing by virtue of the foregoing agreements. [Italics supplied.]

Respondent received a copy of the Board's decision prior to March 1, 1946 (R. 251–252, 295). Nevertheless, on March 5, 1946, without any preliminary showing of majority (R. 79), respondent entered into a contract with the A. F. L. which recognized that union as the exclusive representative of all the employees in the appropriate unit and required membership in the A. F. L. by all the employees in the unit as a condition of employment (R. 127–129, 295). Specifically, the contract, of indefinite duration, required that all employees become and remain members of the A. F. L., or be discharged within 36 hours after notice to respondent of their failure to comply, and that, in the hiring of new employees, preference be given unemployed members of the A. F. L. (R. 128–129). Admittedly, respondent has enforced and given effect to this agreement since its consummation (R. 281–283).

B. The Board's decision and order

The Board found, on the facts related above, that respondent, by its grant of exclusive recognition and a closed-shop contract to the A. F. L. at a time when it knew that a representation question was pending and that it was under an obligation to refrain from throwing its economic weight to either side in the unresolved contest between the rival unions (R. 75–80) had thereby, in violation of Section 8 (1) of the Act, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

The Board's order requires respondent to cease and desist from its unfair labor practices, to cease giving effect to the closed-shop contract, to withhold exclusive recognition from the A. F. L. unless and until the A. F. L. shall have been certified by the Board as the exclusive representative of the employees, and to post appropriate notices (R. 80–83).[7]

SUMMARY OF ARGUMENT

I. The Board validly found that, by granting exclusive recognition and a closed-shop contract to the A. F. L. with knowledge that a representation proceeding was then pending and unresolved, respondent interfered with the freedom of choice guaranteed its employees by Section 7 of the Act.

II. The Board's order is valid.

PRELIMINARY STATEMENT

The Board found that, by conferring exclusive recognition and a closed-shop on the A. F. L. at a time when the A. F. L.'s majority status was in question, respondent granted powerful support to the A. F. L. and thereby violated its duty to remain

[7] The Board dismissed that portion of the complaint which alleged that respondent's conduct also constituted an independent violation of Section 8 (3) of the Act (R. 80, 83). In addition, the Board adopted the Trial Examiner's conclusion that the following allegations of the complaint be dismissed for want of substantial supporting evidence: That respondent urged, persuaded and warned its employees not to become members of the C. I. O.; demanded that they become and remain members of the A. F. L., and threatened them with discharge if they failed to do so; and granted access to its plant to representatives of the A. F. L., while refusing the same privilege to representatives of the C. I. O. (R. 74–75, 92–95).

neutral in the unresolved contest for representation between the two rival unions.

This case presents no novel questions. It is, as the Board pointed out (R. 75–77) and we shall later show, consonant with well-established doctrine long ago enunciated by the Board and uniformly approved by the courts.

ARGUMENT

POINT I

Execution of the contract of March 5, 1946, interfered with the employees' freedom of choice, in violation of Section 8 (1) of the Act

A. The Act required respondent to remain neutral in the election contest

1. *The basic doctrine of neutrality*

The Act is designed to reduce industrial strife by encouraging the making of collective bargaining agreements with unions freely chosen by a majority of the workers. Section 1. Congress sought to achieve this objective by guaranteeing to employees the fundamental right "to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer." *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33; Section 7 of the Act.

It is thus accepted datum that the basic employee right of free choice, to be meaningful, must necessarily be safeguarded by a correlative duty on the part of the employer to refrain from intruding upon that freedom by the use of its economic power as an employer to assist or encourage, or to oppose or

discourage, adherence to any particular labor organization. So undeviating is this requirement of employer nonintervention that the Supreme Court early acknowledged that even "slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 78.

These are the fundamental, self-evident concepts of the statutes. They have been uniformly recognized and approved by the Board and the courts.

2. *Importance of neutrality in the face of an election*

The doctrine of employer neutrality assumes critical significance in the face of a pending Board election, undertaken pursuant to Section 9 (c) of the Act for the purpose of ascertaining the true preference of the employees for a bargaining representative. At such a time, to insure attainment of the statutory objective of genuine self-determination, the employer must, as the Board and the courts have so often declared, remain scrupulously aloof.

Where only one union is a candidate for the employees' favor, the contest is "rightfully one between employees," and the employer may not become a "participant in a contest to which it is not a party." *Reliance Mfg. Co.* v. *N. L. R. B.*, 143 F. 2d 761, 763 (C. C. A. 7) (on contempt). See also: *N. L. R. B.* v. *Bradley Lumber Co.*, 128 F. 2d 768, 70 (C. C. A. 8; *N. L. R. B.* v. *Oregon Worsted Co.*, 96 F. 2d 193, 195 (C. C. A.

9); *N. L. R. B.* v. *Franks Bros.,* 137 F. 2d 989, 991–992 (C. C. A. 1), affirmed 321 U. S. 702; *F. W. Woolworth Co.* v. *N. L. R. B.,* 121 F. 2d 658, 661 (C. C. A. 2); *N. L. R. B.* v. *Taylor-Colquitt,* 140 F. 2d 92, 94 (C. C. A. 4); *N. L. R. B.* v. *Times-Picayune Publishing Co.,* 130 F. 2d 257, 258 (C. C. A. 5); *New York Handkerchief Mfg. Co.* v. *N. L. R. B.,* 114 F. 2d 144, 147 (C. C. A. 7), certiorari denied, 311 U. S. 704; *Locomotive Finished Material* v. *N. L. R. B.,* 142 F. 2d 802, 803 (C. C. A. 10); *Peter J. Schweitzer, Inc.* v. *N. L. R. B.,* 144 F. 2d 520, 524–525 (App. D. C.).

So also, where the choice is to be made among several competing unions, the employer may not enter the race by according such treatment to one of the rivals as will give it either an advantage or disadvantage over the other candidates in the campaign for the employees' favor. "A fair election requires that equal opportunities be given to both [candidates]". *N. L. R. B.* v. *Waterman Steamship Corp.,* 309 U. S. 206, 226. See also: *N. L. R. B.* v. *Pacific Gas & Electric Co.,* 118 F. 2d 780, 788 (C. C. A. 9); *Big Lake Oil Co.* v. *N. L. R. B.,* 146 F. 2d 967, 970 (C. C. A. 5); *Valley Mould & Iron Corp.* v. *N. L. R. B.,* 116 F. 2d 760, 764 (C. C. A. 7), certiorari denied, 313 U. S. 590; *N. L. R. B.* v. *Sunbeam Electric Mfg. Co.,* 133 F. 2d 856, 860 (C. C. A. 7); *N. L. R. B.* v. *Stone,* 125 F. 2d 752, 756 (C. C. A. 7), certiorari denied, 63 S. Ct. 44; *N. L. R. B.* v. *Jahn & Ollier Engraving Co.,* 123 F. 2d 589, 592–593 (C. C. A. 7).

These are the basic principles which govern the legality of employer conduct at a time when employees are confronted with the choice of a bargaining

representative. And these are the principles which the Board held to be controlling in its determination that respondent unlawfully interfered with the freedom of choice of its employees by entering into an exclusive recognition and closed-shop contract with the A. F. L. at a time when the question of its representative status was pending and unresolved.

B. Respondent failed to observe the requisite neutrality when it entered into the contract of March 5, 1946, with the A. F. L.

When, on February 15, 1946, the Board set aside all the elections, including that held among respondent's employees, on the ground that their results were inconclusive, it specifically stated that it would hold other elections as soon as practicable and that the legal effect of its determination was "to keep the question of representation pending before the Board * * *" 65 N. L. R. B. 1052, 1057. Moreover, the Board called the attention of all the employers involved, including respondent, to the general principle that they could not, "pending a new election, give preferential treatment of any kind to any of the labor organizations involved" by renewing their existing agreement with the A. F. L., or by entering into a new, exclusive agreement with it or the C. I. O., but that they might, if they so desired, "recognize each one as the representative of its members" (*id.*).

By March 1, 1946, respondent had received a copy of the Board's decision. Nevertheless, on March 5, it entered into a contract with the A. F. L., one of the candidates in the unscheduled election, granting it not only exclusive recognition but also a closed shop for an indefinite period (*supra,* p. 6).

The Board found that, by recognizing the A. F. L. as exclusive representative at a time when its representative status was in doubt and its contest with the C. I. O. for certification as bargaining agent was unresolved, respondent granted "potent assistance" to the A. F. L. "in derogation of the right of the employees" to vote without restraint in the forthcoming election (R. 79). It found further that, by conferring upon the A. F. L. the additional advantage of a closed shop, respondent rendered "well-nigh impossible" full freedom of later choice by the employees (*ibid.*). It accordingly concluded that the execution of the contract violated Section 8 (1) of the Act. As we now show, this finding is supported by the well-established principle that an employer must maintain an attitude of neutrality in a contest between unions.

1. *Exclusive recognition may be conferred only on a union whose majority status is free from doubt*

The status of exclusive bargaining representative affords a union the unique prestige of speaking to the employer in behalf of all the employees in the unit. *J. I. Case Co.* v. *N. L. R. B.,* 321 U. S. 332; *Steele* v. *Louisville & Nashville R. R. Co.,* 323 U. S. 192, 202. Enjoyment of exclusive power to represent the interests of the employees in dealing with their employer on all problems arising out of the employment relationship necessarily places the representative in a superior position to that of all other organizations seeking the employees' favor. In making a choice as to which of two or more competing

unions to join, an employee will naturally prefer an organization with which his employer has already demonstrated a willingness to deal, rather than one whose acceptability to the employer is still speculative. And, just as naturally, an employee will be drawn to an organization which already speaks for him in its role as exclusive representative and which he therefore feels will represent his interests more effectively if he joins its rolls and contributes his financial support. The Supreme Court early recognized the value to a labor organization of exclusive bargaining status when it observed that "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees". *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 267. See also: *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 598.

The Act, therefore, meticulously enunciates the doctrine of majority rule and provides that the marked advantage of exclusive recognition is properly available only to a labor organization representing a real majority of the employees. Section 8 (5). Where true majority status is in doubt, the grant of exclusive recognition, as the Board and the Courts have consistently held, at once constitutes a departure from required neutrality, unlawful assistance to the union, and illegal interference with the employees' freedom of choice. *International Ass'n of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 78–79, 81; *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. 2d 652, 659–660 (C. C. A. 9); *N. L. R. B.* v. *John Engelhorn & Sons,*

134 F. 2d 553, 556 (C. C. A. 3); *N. L. R. B.* v. *Southern Wood Preserving Co.*, 135 F. 2d 606, 607 (C. C. A. 5); *Elastic Stop Nut Corp.* v. *N. L. R. B.*, 142 F. 2d 371, 380 (C. C. A. 8), certiorari denied, 323 U. S. 722. Indeed, the bestowal of exclusive representation status on one of several competing unions has been considered to be such powerful support as to mark the favorite as a company-dominated organization, which must be disestablished in order to restore the employees' freedom of choice. See, e. g., *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584; *N. L. R. B.* v. *Idaho Refining Co.*, 143 F. 2d 246, 248 (C. C. A. 9).

2. *The A. F. L.'s majority status was not free from doubt; hence, the grant to it of exclusive recognition constituted unlawful assistance*

The timely filing of a petition for investigation of representatives under Section 9(c) of the Act presumptively places in doubt the representative status of any existing exclusive agent and normally requires the Board, upon a reasonable showing of substantial employee preference for a competing union, to resolve the doubt and designate the true representative. Once the Board entertains the petition, and until the question of which of the rival claimants actually represents a majority of the employees is finally settled by established Board procedures, the obligation of neutrality compels the employer to refrain from conferring exclusive recognition upon any of the contestants, or from according it treatment which is tantamount to such recognition. It can readily be seen that otherwise there cannot be a free and un-

trammeled choice in the subsequent Board election. The Board and the Courts have so held. See, e. g., *Matter of Acme Brewing Co.,* 74 N. L. R. B. No. 31; *Matter of LaSalle Steel Co.,* 72 N. L. R. B. 41; *Matter of Armour & Co.,* 72 N. L. R. B. No. 208; *Matter of Roots-Connersville Blower Corp.,* 64 N. L. R. B., 855, 859–860; *Matter of Owens-Illinois Glass Co.,* 60 N. L. R. B. 1015, 1017–1019; *Matter of Minnesota Mining & Mfg. Co.,* 61 N. L. R. B. 697, 699–701; *Matter of Waterman S. S. Co.,* 7 N. L. R. B. 237, 241–242.[8] In conformity with this doctrine, the Board

[8] Before the Board, respondent and the A. F. L. pointed to the Board's decisions in *Matter of American-West African Lines, Inc.*, 21 N. L. R. B. 691; *Matter of General Electric X-Ray Corp.*, 67 N. L. R. B. 997; and *Matter of Con P. Curran Printing Co.*, 67 N. L. R. B. 1419, in support of their argument that, before its decision in the instant case, the Board had not found the execution of a contract under the circumstances of this case to constitute interference with the free expression of employee choice. The cases referred to above in the text negative the contention that the doctrine was first enunciated in the instant case. Moreover, none of the three cases relied upon by respondent and the A. F. L. represents a departure from or a variance with this doctrine.

In the *American-West African* case, the Board specifically found that the employer entered into an exclusive dealing contract with one union at a time when, unlike the facts of the instant case, it had been furnished satisfactory proof of the contracting union's majority and it had no knowledge of the filing of a petition with the Board by a rival union. In the *General Electric X-Ray* case, the Board merely enunciated the rule that a bare claim of majority by a rival union, not followed within ten days by the filing of a petition with the Board, is insufficient to cast doubt upon the proven majority status of another union with whom the employer thereafter enters into an agreement. In the instant case, the doubt as to the A. F. L.'s majority status had been raised by the C. I. O.'s petition long before the contract in question was executed and was brought to the attention of respondent in the Board's decision of

has consistently held that, once representation proceedings have been set in motion, an employer and a union cannot, by entering into an exclusive dealing contract, prevent the Board from holding an election to resolve the question concerning representation. See, e. g., *Matter of St. Genevieve Lime & Quarry Co.,* 70 N. L. R. B. 1259; *Matter of Vermont Marble Co.,* 42 N. L. R. B. 185, 187; *Matter of Wolfsheim & Sachs,* 42 N. L. R. B. 232, 234; *Matter of American-West African Lines, Inc.,* 42 N. L. R. B. 1086, 1089.

One of the first cases in which the Board found that conduct tantamount to exclusive recognition of one of the candidates in the face of a pending election constituted unlawful interference with the employees' freedom of self-determination was *Matter of Waterman Steamship Corp.,* 7 N. L. R. B. 237, 241–242. There, after directing that an election be held among the shipowner's employees to determine whether they desired to be represented for collective bargaining by the A. F. L. or the C. I. O., the Board cautioned the employer not to interfere with the employees' free choice by permitting only one of the candidates access to its vessels for the purpose of talking with the employees aboard. *Matter of American France Line et al.,* 3 N. L. R. B. 64, 74, 76. The shipowner, however, in disregard of the Board's admonition, thereafter permitted only the A. F. L. representatives

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February 15, 1946, three weeks before the contract was entered into. Similarly, the decision in the *Con P. Curran* case is here inapplicable. There, the Board merely followed the established doctrine, not applicable to the facts of this case, that a certification is valid for at least one year as against any rival claim made during that year.

to board the vessels and denied the same privilege to the C. I. O. on the ground that it was bound under its contract with the A. F. L. to grant that permission. In a subsequent complaint case, initiated by the C. I. O., the Board found that this disparate treatment of the two organizations, at a time when the question concerning the representation of the employees was pending and unresolved, "is obviously a discrimination in favor of the I. S. U. [A. F. L.] as against the N. M. U. [C. I. O.], which has the necessary effect of impeding its [the employer's] employees in the free choice of representatives". 7 N. L. R. B. 237, 241. The Board accordingly found that the employer's conduct violated Section 8(1) of the Act. The Supreme Court sustained the Board's finding with the observation that "if the Company was to permit any opportunity for contact with the men, a fair election required that equal opportunities be given to both the C. I. O. and the A. F. of L." *N. L. R. B.* v. *Waterman S. S. Corp.,* 309 U. S. 206, 226.

The *Waterman* case thus plainly holds that the award of exclusive privileges to one of several unions competing for the employees' votes in a forthcoming election violates the employer's duty to refrain from discriminatory treatment of rivals for employee support and impedes the free exercise of employee choice. Permitting only one union to have access to the employees in the course of a pre-election campaign is no different in the prestige it bestows on the favored union and the resultant effect upon the employees

from granting to a competing union the exclusive right to have audience with the employer on behalf of all the employees in the unit. Indeed, the Board, recognizing that these related types of preferred treatment would seriously hamper its efforts to hold a free election, cautioned the employers in both the *Waterman* case and the instant case to refrain from according such preference to either candidate. And, in both cases, it found that the disparate treatment of the contesting unions constituted a violation of Section 8 (1) of the Act.

The Board's finding, that the actual grant of formal exclusive recognition to one of several competing unions pending the resolution of a question concerning representation constitutes unlawful assistance, has been upheld in the two cases involving this principle which have thus far come before the courts. *N. L. R. B.* v. *John Engelhorn & Sons,* 134 F. 2d 553, 556 (C. C. A. 3) ; *N. L. R. B.* v. *Southern Wood Preserving Co.,* 135 F. 2d 606, 607 (C. C. A. 5). In both these cases, the Circuit Courts sustained the Board's finding on the general well-established principle, enunciated in the *Waterman* case, that the bestowal of an exclusive privilege on one union in the face of conflicting representation claims of other unions constitutes assistance to the contracting union. In the *Southern Wood Preserving* case, after holding that the execution of an exclusive recognition agreement under these circumstances violated the neutrality requirements of the Act by according support to the contracting union,

the Court observed that "Financial support is not the only kind of support forbidden".[9]

It is thus apparent that, when respondent entered into an exclusive dealing agreement with the A. F. L.

[9] Before the Board, respondent and the A. F. L. attempted to show that the courts, in two cases, had refused to sustain the doctrine enunciated by the Board in the instant case. But again, the reliance on these two cases is misplaced. In *N. L. R. B.* v. *Pacific Greyhound Lines, Inc.*, 106 F. 2d 867 (C. C. A. 9), the sole question before this Court was whether the modification of a closed-shop agreement in the face of a scheduled election constituted sufficient basis for adjudging the employer in contempt of an earlier decree issued by this Court against the employer. 91 F. 2d 458. The Board's petition for a rule to show cause why the employer should not be so adjudged was dismissed by this Court on the narrow ground of failure to state facts within the scope of the outstanding decree. This Court held that, since the new acts complained of were not of the same character as those prohibited in its decree, the controversy was one which should be determined by the Board, rather than the Court. The question of whether the continued recognition of one of the unions constituted a violation of the Act was, therefore, never decided by this Court.

Nor is *N. L. R. B.* v. *McGough Bakeries*, 153 F. 2d 420 (C. C. A. 5), in point. There, the question before the Court was not whether the employer committed an unfair labor practice by granting exclusive recognition and a closed-shop contract to a union at a time when a question concerning representation was pending. Although a petition had been filed by the contracting union before the execution of the contract, the Board did not thereafter act upon the petition because preliminary investigation indicated to it that the contracting union was illegally dominated. The unprocessed petition was regarded as having lapsed at the time the contract was entered into. The sole issue before the Court was whether the employer had, by various forms of assistance other than the closed-shop contract, rendered the union company-dominated and whether, therefore, the closed-shop contract was invalid under the proviso to Section 8 (3) of the Act because made with an assisted union. The sole issue on review was thus whether

in the face of an unresolved dispute as to representation and with the knowledge that an election would be scheduled to settle that dispute, it unlawfully threw its economic weight in support of the A. F. L. in the forthcoming election and gave it a favored position which interfered with the free choice of its employees.

3. *The A. F. L.'s majority status was not free from doubt; hence, the grant to it of a closed shop constituted unlawful assistance*

But respondent did more than to confer upon the A. F. L. exclusive bargaining status. It armed the A. F. L. with a closed shop—the most powerful weapon for obtaining votes in the anticipated election. The contract, of indefinite duration, compelled all employees, as a condition of further employment, to become and remain members of the A. F. L. (*supra,* p. 6). It further provided that, in the hiring of new employees, preference would be given to unemployed members of the A. F. L. (*ibid.*). The A. F. L. could thus in practice pick and choose the electorate in the forthcoming election by preventing the employment of its opponents, by compelling

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the employer had earlier granted such support to the contracting union as to render it company-dominated and take the closed-shop contract outside the protection of Section 8 (3) of the Act. The Court held that there was insufficient evidence to support the Board's finding of violation of Section 8 (2) and that, consequently, the contract with the union, which had a majority and which majority the Court found was uncoerced, was lawful under the proviso to Section 8 (3) of the Act and that the discharges made pursuant thereto were also proper. This case, like the *Pacific Greyhound* case, simply did not involve an adjudication of the validity of the doctrine of the instant case.

all employees to join its ranks, and by holding "in terrorem of discharge" those employees who supported its rival in the pre-election campaign. *Local 2880* v. *N. L. R. B.*, 158 F. 2d 365, 368 (C. C. A. 9), certiorari granted May 6, 1947, 15 U. S. Law Week 3423.

As this Court has already held in the *Local 2880* case, enforcement of an existing closed-shop contract during a pre-election campaign constitutes unlawful interference with the employees' freedom of choice. See also: *N. L. R. B.* v. *American White Cross Laboratories,* 160 F. 2d 75 (C. C. A. 2). How much more corrosive of that freedom is the imposition upon the employees of a *new* closed-shop contract during such a critical period.[10] For this reason, the Board has consistently condemned closed-shop contracts entered into or extended during the pendency of a question concerning representation. *Matter of Midwest Piping & Supply Co., Inc.,* 63 N. L. R. B. 1060, 1068–1071; *Matter of Phelps Dodge Copper Products Corp.,* 63 N. L. R. B. 686; *Matter of Abraham B. Karron,* 41 N. L. R. B. 1454, 1463–1464; see also: *Matter of Ken-Rad Tube and Lamp Corp.,* 62 N. L. R. B. 21; *Matter*

[10] The Board did not consider it necessary to find that the closed-shop contract also violated Section 8 (3) of the Act, which permits the making of a closed-shop contract only with a union which actually represents a majority of the employees. It should, nevertheless, be pointed out that the courts have consistently noted that the making of such a contract with a union which does not have a true majority following constitutes powerful assistance even in the absence of an impending election. See, e. g., *N. L. R. B.* v. *Electric Vacuum Cleaner Corp.*, 315 U. S. 685, 695; *N. L. R. B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 242–243 (C. C. A. 9); *N. L. R. B.* v. *Graham Ship Repair Co.*, 159 F. 2d 787 (C. C. A. 9).

of Southern Wood Preserving Co., 45 N. L. R. B. 230, 237–238, enforced 135 F. 2d 606 (C. C. A. 5); *Matter of Dominic Meaglia & Samuel Meaglia,* 43 N. L. R. B. 1277, 1301; *Matter of Fiss Corp.,* 43 N. L. R. B. 125, 136, enforced 136 F. 2d 991 (C. C. A. 3); *Matter of Premo Pharmaceutical Laboratories,* 42 N. L. R. B. 1086, 1097, enforced 136 F. 2d 85 (C. C. A. 2); *Matter of John Engelhorn & Sons,* 42 N. L. R. B., 886, 878, enforced 134 F. 2d 533 (C. C. A. 3); *Matter of Ward Baking Co.,* 8 N. L. R. B. 558, 565–566. It should be noted that in none of these cases could the parties have been so clearly aware of the existing doubt concerning the majority status of the contracting union as they were in the instant case. Here, the Board, in its decision of February 15, 1946, specifically and officially noted that the question of which of the competing unions represented a majority of the employees was still unresolved and was still before the Board (*supra,* pp. 5–6.)

It plainly follows, as the Board found (R. 98, 74–75), that "by entering into the closed-shop contract with the A. F. L. on March 5, 1946, with knowledge of the pending proceedings for the determination of representatives, the respondent indicated its approval of the A. F. L., accorded it unwarranted prestige, encouraged membership therein, discouraged membership in the C. I. O. and thereby rendered unlawful assistance to the A. F. L., which interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor

practices within the meaning of Section 8 (1) of the Act."

C. Respondent is without a valid defense

1. *Inconclusive election results do not operate to restore majority status*

Before the Board, respondent and the A. F. L. sought to justify the execution of the March 5 contract by the following chain of argument: Until the representation petition was filed, the A. F. L. was the majority representative of the employees. Its majority status must, therefore, be presumed to have continued unless and until a new bargaining agent was certified. Since the first election did not result in the certification of another representative, the A. F. L. retained its status as majority representative. Consequently, when the old contract expired, respondent was obligated by Section 8 (5) of the Act to recognize and deal with the A. F. L. as exclusive representative of the employees and to enter into a contract with it.

This argument is as unsound as it is ingenious. Respondent and the A. F. L. relied on a series of cases which are here plainly inapposite. The first line of cases stands for the proposition that it is an unfair labor practice for an employer to refuse to bargain with a union which has lost its majority status by reason of the employer's earlier unlawful rejection of the union or because of other unfair labor practices. *N. L. R. B.* v. *Federbush,* 121 F. 2d 954, 956 (C. C. A. 2); *N. L. R. B.* v. *Piqua Munising Wood Products Co.,* 109 F. 2d 552, 554–555 (C. C. A. 6); *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. 2d

652, 660 (C. C. A. 9); *Franks Bros.* v. *N. L. R. B.*, 321 U. S. 702. The doctrine of these cases is that, but for the employer's original wrongful refusal to bargain with the union when it did represent a majority of the employees, or his other unfair labor practices, the union would have maintained its majority following. The Board, therefore, has required the employers in cases of this type to dissipate the effects of their unfair labor practices by bargaining with the union even though it no longer commanded a majority as of the date of the Board's order. The Supreme Court, in *Franks Bros.* v. *N. L. R. B.*, 321 U. S. 702, 705, cited by respondent and the A. F. L., sustained as valid the Board's bargaining order in such situations on the ground that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."

The rule of these cases is simply not applicable to the facts of the instant case. Respondent did bargain with the A. F. L. for many years prior to the filing of the petition for investigation and certification of representatives, thereby according the bargaining relationship that "chance to succeed" which the *Franks Bros.* holding requires. At no time, moreover, did respondent refuse to recognize or deal with the A. F. L., or assert that it had lost its majority status. The question of whether the A. F. L. still commanded the requisite majority was raised by the C. I. O. through the appropriate statutory procedure, and not by respondent as an excuse for any refusal to bargain. The presumption of continued majority

status which the *Franks Bros.* decision recognizes is, therefore, not operative on the facts of the case at bar.

The second group of decisions with which respondent and the A. F. L. sought to support their argument similarly are not controlling on the facts of the instant case. This second line of cases supports the doctrine, established by the Board in another context, that a certification must be honored by an employer for a reasonable period, during which time the majority status of the certified union is presumed to continue and is not subject to attack. *N. L. R. B.* v. *Appalachian Electric Power Co.,* 140 F. 2d 217, 220–222 (C. C. A. 4); *N. L. R. B.* v. *Botany Worsted Mills,* 133 F. 2d 876, 881–882 (C. C. A. 3); *N. L. R. B.* v. *Whittier Mills Co.,* 111 F. 2d 474, 477–478 (C. C. A. 5); *Matter of Anderson Mfg. Co.,* 58 N. L. R. B. 1511, 1512–1513. It is certainly not to this context here presented that that doctrine is applicable. That doctrine stands for the proposition that *after* the doubt as to representation has been resolved by means of a validly conducted election, upon the basis of which the Board has issued a certification, the certified union must be accorded exclusive recognition for a reasonable period. This is on the theory that there must be "some measure of permanence in the results" of a validly conducted election. *N. L. R. B.* v. *Century Oxford Mfg. Corp.,* 140 F. 2d 541, 542 (C. C. A. 2), certiorari denied, 323 U. S. 714, and that "freedom to choose a representative does not imply freedom to turn him out of office within the next breath" (*ibid*). The same line of cases holds that the length of time "the employees' undoubted power to recall an election

representative may be suspended, is a matter primarily, perhaps finally, for the Board" *Century Oxford* case, *supra,* at p. 543; *Appalachian Electric Power* case, *supra.* Here the Board acted upon the fact that the A. F. L. had already enjoyed such exclusive status for a reasonable period, and the Board, by entertaining the petition for investigation and certification of representatives, determined that there was in fact a reasonable doubt as to the A. F. L.'s representative status. This doubt was made further evident by the election returns, which showed that a majority of the employees did not favor either union.

There is, therefore, no basis for the contention that an inconclusive election, particularly when it is to be followed by another vote, restores the bargaining relationship which existed before the representation proceeding was instituted. On the contrary, once a representation proceeding is set in motion, it raises and keeps alive the issue of majority representation until a conclusive election has been held and the Board has issued its findings on the final desires of the employees. *Inland Empire District Council* v. *Millis, et al.,* 325 U. S. 697, 707; *N. L. R. B.* v. *Int'l Brotherhood of Electrical Workers,* 308 U. S. 413, 414–415. In the instant case, the Board made this point clear beyond doubt when it stated in its decision of February 15, 1946, that it retained jurisdiction of the question concerning representation and that another election would be held as soon as practicable (R. 58–59).

Indeed, by recognizing the A. F. L. in the face of a pending representation proceeding before the

Board, respondent, far from complying with its obligation under the Act, arrogated to itself the function of determining the question of majority status, "which Congress entrusted to the Board alone." *N. L. R. B.* v. *Waterman S. S. Corp.,* 309 U. S. 206, 226. Respondent, therefore, unlawfully interfered not only with the right of its employees but also with the Board's orderly processes for affording a true exercise of that right. *N. L. R. B.* v. *Bird Machine Co.,* decided May 20, 1947 (C. C. A. 1), 20 L. R. R. M. 2200, 2202. The vice of respondent's conduct becomes even more apparent when it is noted that respondent did not even require proof of majority from the A. F. L. before entering into the contract of March 5 and that such following as the A. F. L. had at that time could not possibly have been truly representative, for the season was then at its lowest ebb and respondent had in its employ only 70 persons, as compared with the approximately 1,200 people it employed at the height of the season (R. 266, 316).

2. *The doctrine of this case is not inconsistent with the policy of stability of bargaining relationships*

Respondent and the A. F. L. made the further related argument before the Board that the doctrine enunciated in this case is at odds with the policy of the Act, which encourages the making of collective bargaining agreements and the maintenance of stable bargaining relationships. The Board's holding in this case, they say, would deprive the employees of the right to bargain collectively during the entire interval in which the representation proceeding is

awaiting final disposition, thereby preventing effectuation of the collective bargaining policy of the Act. The short answer to this argument is that it begs the question. The right guaranteed to employees is that of bargaining collectively through "representatives of *their own* choosing." The Act does not foster or promote bargaining with a union whose majority status is in doubt. On the contrary, it recognizes that the grant of exclusive dealing rights to a non-representative agent is a prolific source of labor strife, which the unfair labor practice provisions of the Act, protecting freedom of choice, were designed to eliminate. Sections 1, 7, and 8. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 44–45.[11] And Congress, when it invested the Board with exclusive power under Section 9 of the Act to resolve conflicts as to representation, was obviously mindful of the fact that it takes time for the Board to determine the question of representation and that

[11] *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, does not, contrary to the contention of respondent and the A. F. of L. before the Board, hold otherwise. There, the Supreme Court specifically stated that the pendency of a question concerning representation does not preclude the making of a contract with one of the competing unions *for its members only*, and not for exclusive recognition as agent for all the employees. 305 U. S. at pp. 237–238. Such a limited contract, the Supreme Court held, would not conflict with the declared policies of the Act and would not promote industrial strife. The Board, acknowledging that a contract *for members only* is permissible in the face of a pending representation proceeding, announced to the parties in its decision of February 15, 1946, that they could enter into such a limited agreement. But respondent went beyond the bounds of what was allowable by entering into not only an *exclusive recognition* agreement but also an arrangement for a closed shop.

such delay in the institution of bargaining procedures as is necessarily incidental to the prosecution of a representation proceeding is inevitable in the effectuation of the declared policy of the Act. If the contention here urged by respondent and the A. F. L. were to prevail, the aim of the Act, to vouchsafe employees the right to bargain collectively through representatives *of their own choice,* could never be realized.

Nor does it avail respondent and the A. F. L. to characterize the Board's conduct in this case as inconsistent in that the Board allegedly both honored and disregarded the declared statutory policy at two different stages in these proceedings. Before the Board, they argued that, in the original Decision and Direction of Elections, the Board acknowledged the need for permitting the old contract then in existence to operate through the end of its term, when it stated that "any certification of representatives which may issue as a result of the elections hereinafter directed shall be solely for the purpose of designating a bargaining representative to negotiate a new agreement to become effective upon the expiration of the existing contract." *Matter of Bercut-Richards et al.,* 64 N. L. R. B. 133, 135. By thus permitting the old contract to continue in effect pending the holding of the elections and the certification of bargaining representatives, they contend, the Board acknowledged that an exclusive recognition agreement would not interfere with the employees' freedom of choice. Yet, subsequently, in the instant case, their argument continues, the Board found that the execution of a new agreement almost immedi-

ately upon the expiration of the old *did* tend to hamper the free expression of the employees' desires.

Here again the answer is plain. In the first place, the Board, in its Supplemental Decision and Order of February 15, 1946, clarified the language quoted above by stating that any closed-shop features of the old contract could not be enforced as against those who supported the rival union in the election. *Matter of Bercut-Richards et al.* 65 N. L. R. B. 1052, 1958, n. 15. This is in conformity with this Court's decision in the *Local 2880* case. Secondly, the Board noted (R. 58–59) that the old contract would come to a close in a relatively short time, during which few persons would be employed by reason of the supervening slack season. Thus, the enjoyment of exclusive bargaining status under the old contract would have had little practical meaning in terms of the exertion of influence on the employees' choice. Moreover, and most importantly, the old contract was lawfully made and did not constitute assistance to the union. All employee voters were aware of its existence and knew that the election was for the purpose of selecting a bargaining representative to succeed the contracting union upon the expiration of the contract. They could, therefore, go into the election with a free choice of alternatives, knowing that their employer was not favoring the A. F. L. by merely permitting the contract to run out its term. The execution of a new contract, however, upon the expiration of the old, was bound, the Board could reasonably find, to have a different effect. Now it meant that the employer had gone beyond the requirements of the old agreement and was, of his

own accord, favoring one union over another. This lesson must have been made particularly clear by the closed-shop provision of the new contract, compelling all employees upon penalty of loss of employment to join the contracting union.

3. *Events subsequent to the date of the order and matters not raised before the Board may not be considered on review; the events relied upon are in any case immaterial*

Respondent has filed in this Court an answer and an accompanying affidavit in which its counsel now avers for the first time: (1) that the A. F. L. won an election held at respondent's plant subsequent to the date of the Board's order; (2) that the A. F. L. now threatens a strike as well as other economic reprisals if respondent should comply with the Board's order; and (3) that, if this Court should enforce the Board's order, the A. F. L. will bring about a complete shutdown of respondent's Stockton plant (R. 529–533). To support the first allegation, respondent, on February 3, 1947, filed a motion for leave to adduce as additional evidence the Board's supplemental decisions in *Matter of Bercut-Richards Packing Co., et al,* and the results of a Board election conducted at respondent's Stockton plant on August 31, 1946, after the date of the Board's order in this case. Respondent did not, however, seek to adduce any evidence as to the second and third points of its answer and accompanying affidavit. This Court granted the motion for leave to adduce but reserved judgment as to the materiality of the evidence until its consideration of the case on its merits.

We submit, first, that evidence of this character has no valid place in the record on which this case is to be decided. Evidence as to how respondent's employees voted in an election held subsequent to the Board's order does not bring before the Court the kind of matter which Section 10 (e) of the Act contemplates. It is well settled that, in a proceeding to review or enforce a final Board order, the validity of the Board's findings and order is determined on the record before the Board at the time the order was made. *N. L. R. B.* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271; *N. L. R. B.* v. *Newport News Shipbuilding and Drydock Co.,* 308 U. S. 241, 249–50, and cases cited, *infra,* pp. 34–35. Therefore, evidence only as to events which predated the Board's order may be considered "additional" under Section 10 (e). The Board's order is based upon its finding that respondent committed an unfair labor practice on March 5, 1946, by entering into an exclusive recognition and closed-shop contract with the A. F. L. at a time when that union's majority status was put in doubt by the pending representation proceeding. The validity of this finding and the propriety of the Board's order based thereon must be judged by the record made at the time of the order. Events which occurred after the date of the order can in no way excuse or justify such conduct in retrospect. *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc., supra; N. L. R. B.* v. *American Creosoting Co.,* 139 F 2d 193, 196 (C. C. A. 6), certiorari denied, 321 U. S. 797; *Wilson & Co.* v. *N. L. R. B.,* 156 F 2d 577, 579 (C. C. A. 10), certiorari denied, December 9, 1946, 19 L. R. R. M. 87. It is, therefore, immaterial to the

issues on review how respondent's employees voted in an election held after execution of the contract and subsequent to the Board's order.

If the Board's finding that respondent committed an unfair labor practice on March 5, 1946, by entering into the exclusive-recognition and closed-shop contract, is valid, the Board's order is entitled to enforcement regardless of subsequent events. Section 10 (e) of the Act makes enforcement mandatory. *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc., supra.* Moreover, whatever the final outcome of the second election, the Board's order is necessary to effectuate the policies of the Act by preventing respondent from engaging in similar conduct at future times when its employees may again be called upon to vote in other Board-conducted elections and by providing assurance that the Board's orderly election processes will not again be thwarted. *N. L. R. B.* v. *Express Publishing Co.,* 312 U. S. 426, 437–438; *N. L. R. B.* v. *Waterman S. S. Corp.,* 309 U. S. 206, 226

Nor do the results of the election [11a] operate retrospectively to make legal conduct which was illegal at the time of its commission. The operative fact is the interference by respondent with the employees' choice by unneutral conduct at a time when two rival unions were competing for support *in an as yet unconducted election.* The tally made *after the election* does not alter the fact that support was rendered to one of two competing unions in a

[11a] Quite apart from the fact that objections to this last election based upon new alleged acts of interference are now under investigation by the Board.

forthcoming election. To contend, as do respondents and the A. F. L., that the election held after the making of the contract retroactively reflects the desires of the employees as of the time the contract was made, is to assume an identity of conditions at both times. This assumption completely ignores the interjection of the contract itself as a powerful factor conditioning the employees' choice.

Respondent, apparently, is relying on the affidavit annexed to its answer for evidence to support the second and third points there raised, *i. e.,* that the A. F. L. now threatens a strike if respondent complies with the Board's order, and that the A. F. L. will bring about a complete shut-down of its plant if this Court should enforce the Board's order. This method of attempting to introduce new evidence in the case is not only procedurally defective, but the new matter itself is wanting in substance. That respondent may not resort to this device to enlarge the record is well established. As this Court had occasion to state, "Such practice is not in harmony with orderly procedure." *N. L. R. B.* v. *Sunshine Mining Co.,* 110 F. 2d 780, 784 (C. C. A. 9). *In N. L. R. B.* v. *Newport News Shipbuilding and Dry Dock Co.,* 308 U. S. 241, the Supreme Court declared (at pp. 249–250):

> The statute expressly deprives the reviewing court of power to consider facts thus brought to its attention. The case must be heard on the record certified by the Board. The appropriate procedure to add facts to the record as certified is prescribed in Section 10 (e) of the Act.

> Since respondent did not move the Board or this Court for leave, under Section 10 (e) of the Act, to introduce such additional evidence, the new matter may not now be considered.

Accord: *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, ~~276~~ 226; *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 96 F. 2d 197, 198 (C. C. A. 9); *N. L. R. B.* v. *Oregon Worsted Co.*, 96 F. 2d 193, 194 (C. C. A. 9); *N. L. R. B.* v. *Blanton Co.*, 121 F. 2d 564, 571–572 (C. C. A. 8); *Bussman Mfg. Co.* v. *N. L. R. B.*, 111 F. 2d 783, 788 (C. C. A. 8); *Wilson & Co.* v. *N. L. R. B.*, 156 F. 2d 577, 579 (C. C. A. 10), certiorari denied on December 9, 1946, 19 L. R. R. M. 87; *Southport Petroleum Co.* v. *N. L. R. B.*, 315 U. S. 100, 104–105.

Apart from the procedural deficiency mentioned, the claimed threat of economic reprisals by the A. F. L. is no defense for the three-fold reasons, first, that it was never urged before the Board as a defense to the making of the contract (*N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385); secondly, to build a defense upon it is to exalt, as a criterion of permitted conduct, the private convenience of the employer above the policies and plain command of the statute (*N. L. R. B.* v. *Star Publishing Co.*, 97 F. 2d 465, 470);[12] and thirdly, it is

[12] Accord: *Warehousemen's Union* v. *N. L. R. B.*, 121 F. 2d 84, 87 (App. D. C.), certiorari denied, 314 U. S. 674; *N. L. R. B.* v. *Isthmian Steamship Co.*, 126 F. 2d 895, 900 (C. C. A. 2); *N. L. R. B.* v. *John Engelhorn & Sons*, 134 F. 2d 553, 557–558 (C. C. A. 3); *South Atlantic Steamship Co.* v. *N. L. R. B.*, 116 F. 2d 480, 481 (C. C. A. 5), certiorari denied, 313 U. S. 582; *N. L. R. B.* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 532, 533 (C. C. A. 6); *McQuay-Norris Mfg. Co.* v. *N. L. R. B.*, 116 F. 2d 748, 752 (C. C. A. 7), certiorari denied, 313 U. S. 565; *N. L. R. B.* v. *Gluek Brewing Co.*,

not a legitimate ground for withholding enforcement of an otherwise valid order. *Idaho Potato Growers* v. *N. L. R. B.*, 144 F. 2d 295, 307–310 (C. C. A. 9), certiorari denied, 323 U. S. 769; *N. L. R. B.* v. *National Broadcasting Co., Inc.*, 150 F. 2d 895 (C. C. A. 2); *N. L. R. B.* v. *John Engelhorn & Sons*, 134 F. 2d 553, 557–558 (C. C. A. 3); *N. L. R. B.* v. *Gluek Brewing Co.*, 144 F. 2d 847 (C. C. A. 8). This Court will "not assume that [the A. F. L.] will not respect its decision," and there are ample means "to enable the court to protect its order." *National Broadcasting* case, *supra*, at p. 900.

Point II

The Board's order is valid

The Board's order requires respondent to cease and desist from its unfair labor practices, to cease giving effect to the illegal closed-shop contract dated March 5, 1946, to withhold recognition from the A. F. L. unless and until it shall have been certified by the Board as the exclusive representative of the employees, and to post appropriate notices (R. 80–83). The validity of these provisions on the findings made is well established.[13]

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et al., 144 F. 2d 847, 853–854 (C. C. A. 8); cf. *N. L. R. B.* v. *Remington Rand, Inc.*, 130 F. 2d 919, 936 (C. C. A. 2); *N. L. R. B.* v. *Goodyear Tire and Rubber Co.*, 129 F. 2d 661, 664 (C. C. A. 5).

[13] The validity of the Board's order on the findings made is not challenged.

CONCLUSION

It is respectfully submitted that the Board's decision is reasonable in finding that respondent's conduct here in question constituted a violation of Section 8 (1) of the Act, that its order is valid, and that a decree should issue enforcing the order in full.

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APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employes, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement

or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings

as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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